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OFFICE OF PETITIONS

In re Application of:
Fecher et al.
Pat. No.: 7,714,132
Issue Date: 05/11/2010
Application No. 10/598777
Filing or 371(c) Date: 09/11/2006
Atty. Docket No.: 66535.000013

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: ON REQUEST FOR
: RECONSIDERATION OF
: PATENT TERM ADJUSTMENT
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This decision is in response to the “REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(b),” filed March 16, 2010. Patentees request that the determination of patent term adjustment be corrected to 884 days. The application matured into U.S. Patent No. 7,714,132 on May 11, 2010, and is therefore properly treated under 37 C.F.R. § 1.705(d).

The request for reconsideration of patent term adjustment is **GRANTED TO THE EXTENT INDICATED HEREIN.**

On May 11, 2010, the above-identified application matured into U.S. Patent No. 7,714,132. The patent issued with a PTA of 833 days.

Regarding the “B” period under 37 C.F.R. § 1.702(b), Patentees provide that based upon the Notice of Allowability, Patentees calculated the issue date to be June 29, 2010, and calculated a period of adjustment of 291 days¹.

Regarding Applicant delay, Patentees argue that the period of delay of two (2) days attributed to Patentees in connection with the filing of a reply to a Election/ Restriction Requirement on September 28, 2009, three months and two days after the mailing of the Restriction/Election Requirement June 26, 2009, is in contravention of 35 U.S.C. § 21 and 37 C.F.R. § 1.7(a). and is not a failure to engage in reasonable efforts to conclude processing or examination of the

¹ The patent issued on May 11, 2010, and the patent term adjustment pursuant to 35 U.S.C. § 154(b)(1)(B) is 242 days.

application because as stated in 35 U.S.C. § 21, “[w]hen the day, or the last day, for taking any action or paying any fee in the United States Patent and Trademark Office falls on Saturday, Sunday, or a Federal holiday within the District of Columbia, the action may be taken, or fee paid, on the next succeeding secular or business day.”

Patentees' arguments have been carefully considered. Regarding the delay of two (2) days attributed to Applicant under 37 CFR 1.704(b), for filing the reply to filing of a reply to a Election/Restriction Requirement on September 28, 2009, three months and two (2) days after the mailing of the Restriction/Election Requirement June 26, 2009, Patentees attention is directed to 37 CFR 1.703(f), which provides that “[t]he date indicated on any certificate of mailing or transmission under § 1.8 shall not be taken into account in this calculation” of patent term adjustment. That is, while the date indicated on any certificate of mailing or transmission under § 1.8 will continue to be taken into account in determining timeliness, the date of filing (§ 1.6) will be the date used in a patent term adjustment calculation. Applicant may wish to consider the use of the “Express Mail Post Office to Addressee” service of the United States Postal Service (§ 1.10) or facsimile transmission (§ 1.6(d)) for replies to be accorded the earliest possible filing date for patent term adjustment calculations. (Emphasis supplied). *See also, Comment 10, Changes to Implement Patent Term Adjustment under Twenty-Year Patent Term; Final Rule, 65 Fed. Reg. 54366 (September 18, 2000).* In accordance with 37 CFR 1.703(f), the Office properly used September 28, 2009, the filing date of the reply to a Election/Restriction Requirement, in calculating the patent term adjustment.

A review of the application file history also reveals that a Supplemental Response Under 37 C.F.R. § 111 was filed on December 12, 2009, after filing the reply to the Election/Restriction Requirement on September 28, 2009. Submission of a supplemental reply or other paper, other than a supplemental reply or other paper expressly requested by the examiner, after a reply has been filed is deemed a failure to engage in reasonable efforts to conclude prosecution or processing within the meaning of 37 CFR 1.704(c)(8), and a reduction of 75 days, beginning on the day after the date the initial reply was filed, September 29, 2009, and ending on the date that the supplemental reply was filed, December 12, 2009, is properly included in the patent term adjustment.

In view thereof, it is concluded that the patent correctly issued with a revised Patent Term Adjustment of seven hundred fifty-eight (758) days (835 days Office delay – 77 days Applicant delay).

The Office will *sua sponte* issue a certificate of correction. Pursuant to 37 CFR 1.322, the Office will not issue a certificate of correction without first providing assignee or patentee an opportunity to be heard. Accordingly, patentees are given **one (1) month or thirty (30) days**, whichever is longer, from the mail date of this decision to respond. No extensions of time will be granted under § 1.136.

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under

35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

The Office acknowledges submission of the \$200.00 fee set forth in 37 CFR 1.18(e). No additional fees are required.

The application file is being forwarded to the Certificates of Correction Branch for issuance of a certificate of correction in order to rectify this error. The Office will issue a certificate of correction indicating that the term of the above-identified patent is extended or adjusted by **SEVEN HUNDRED FIFTY-EIGHT (758) DAYS**.

Telephone inquiries specific to this matter should be directed to the unbdersigned at (571) 272-3232.

/Derek L. Woods/

Derek L. Woods
Attorney
Office of Petitions

Enclosure: Copy of DRAFT Certificate of Correction

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT : 7,714,132 B2

DATED : May 11, 2010

INVENTOR(S) : Fecher et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

On the cover page,

[*] Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 USC 154(b) by 833 days.

Delete the phrase "by 833 days" and insert – by 758 days--